



PHONE (360) 598-3311
Fax (360) 598-6295
<http://www.suquamish.nsn.us>

THE SUQUAMISH TRIBE

PO Box 498 Suquamish, WA 98392-0498

November 23, 2011

Allison Hiltner
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900 MC ECL-111
Seattle WA 98101

Re: Lower Duwamish Waterway Site Remedy Review

Dear Ms. Hiltner

The Suquamish Tribe appreciates the opportunity to provide comment on the EPA preferred alternative 5c "enhanced" to the National Remedy Review Board and Contaminated Sediments Technical Advisory Group (NRRB/CSTAG). The Suquamish Tribe has been working cooperatively with EPA and stakeholders on the Lower Duwamish West Waterway Superfund clean-up site.

History

The Suquamish people lived, gathered food stuffs, ceremonial and spiritual items, and hunted and fished for thousands of years in western Washington. The 1855 Treaty of Point Elliot outlined articles of agreement between the United States and the Suquamish Tribe. Under the articles of the treaty the Tribe ceded certain areas of its aboriginal lands to the United States and reserved for its use and occupation certain lands, rights and privileges and the United States assumed fiduciary obligations, including, but not limited to, legal and fiscal responsibilities to the Tribe.

An aboriginal right retained under the Treaty includes the immemorial custom and practice to hunt, fish, and gather within the usual and accustomed grounds and stations, which was the basis of the Tribe's source of food and culture. Treaty-reserved resources situated on and off the Port Madison Indian Reservation include, but are not limited to, fishery resources situated within the Suquamish Tribe's adjudicated usual and accustomed (U and A) fishing area. The Suquamish Tribe U and A extends well beyond Reservation boundaries. The U and A fishing places of the Suquamish Tribe include marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River in Canada, including Haro and Rosario Straits, the streams draining into the western side of Puget Sound and also Hood Canal. The U and A of the Suquamish Tribe also extends west into Jefferson County, and south into Mason County.

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On February 12, 1974, U.S. District Court Judge Boldt ruled that treaty rights entitled Indian Tribes to half of the harvestable fish running in their traditional waters, a right which was later affirmed to include shellfish and other natural resources. The ruling established Washington State's federally recognized Indian Tribes as co-managers (with Washington Department of Fish and Wildlife) of fisheries resources within their usual and accustomed fishing areas. The Suquamish Tribe, as a resource co-manager, is active in participating in the environmental review process for development proposals within its U and A. The Tribe not only has the right to fish but also the right to preserve and maintain treaty reserved resources. Thus, our standard for review is based on the protection and maintenance of resources as well as the Tribes right to fish and harvest.

The Tribe has taken a leadership position in efforts to protect, restore, and enhance the marine waters of Puget Sound to ensure protection of the Tribe's treaty and cultural resources. The Tribe reviews proposed projects that might affect the health and sustainability of Tribal resources through SEPA, NEPA, Corps Public Notices, and other public processes, the Tribe is a partner in Water Quality cleanup plans (TMDLs), CERCLA (Superfund) remediation, and Salmon Recovery Funding Board proposals. In addition, the Tribe is a natural resource trustee in Federal Natural Resource Damage Assessment processes.

The Suquamish Tribe has traditionally harvested and consumed fish and shellfish from the LDW and intends to do so in the future. Risk management decisions should be protective of tribal rights to access and harvest and should not limit or restrict future expression of those rights based on current contaminated conditions. As a federal trustee of tribal treaty-reserved resources, the EPA has the responsibility of ensuring that tribes have the inexorable ability to exercise their constitutionally protected treaty rights (including the ability to harvest resources as well as protection of the habitat). The trust responsibility stems from various legal authorities including the U.S. Constitution, Treaties, statutes, executive orders, and historical relations with Indian tribes.

Technical Impracticability (TI) Waiver

The Suquamish Tribe does not support the use of a TI waiver. The Suquamish Tribe does not intend to compromise treaty-reserved rights or give up on resources, and will continue to work diligently to restore resources and habitat throughout the U&A. We understand that it may not be technically possible to meet cleanup levels in the required timeline but we would prefer flexibility in the clean-up timeline (interim ROD) over a TI waiver. Not only does a TI waiver set unacceptable precedent regarding sediment remedies but a TI waiver does not protect Tribal treaty rights for future generations and precludes future use of new, innovative technologies.

Institutional Controls

Institutional controls (IC's) should not be used as long term, permanent clean up options. ICs do not protect human health pursuant to achieving Remedial Action Objective - 1 (RAO 1). RAO 1 requires achievement of human health protective levels through the reduction of COC concentrations in sediment and surface water. The use of ICs should be minimized to the extent possible. ICs must consider impacts to treaty protected rights to harvest in usual and accustomed areas. The Tribe does not consider limitation of treaty rights to be "positive behavior change". Institutional controls need

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to be a temporary solution with eventual clean up. Institutional controls should NOT be considered remediation measures or long term remedies. ICs do not protect human health, which requires achievement of protective levels through the reduction of contaminant levels in sediment. Development of an IC plan should be done in coordination with affected Tribes to meet EPA objectives while remaining protective of Tribal Treaty resources and harvest activities.

Activated Carbon Enhancement

As currently presented, ENR is the most prominent component of the remedial alternative. Caps cannot conflict with or restrict Tribal treaty fishing rights or other treaty protected rights in any way. That said, the Tribe is interested in having innovative reactive capping technologies included in the remedial alternative (alternative 5c "enhanced"). However, the Tribe strongly recommends a small pilot project to evaluate potential impacts to the substrate and associated biota prior to more extensive use.

We look forward to continuing to work cooperatively with EPA and stakeholders on a final remedy. If you have any questions regarding the comments provided please contact Alison O'Sullivan at aosullivan@suquamish.nsn.us or Denice Taylor dtaylor@suquamish.nsn.us.

Sincerely,

Alison O'Sullivan
Biologist, Suquamish Tribe

Denice Taylor
Environmental Scientist, Suquamish Tribe